No. 237

FILED
JUL 14 1956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

ARMCO DRAINAGE & METAL PRODUCTS, INC.,
FABRICATING DIVISION,

Petitioner,

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Writ	9
Conclusion	29
Appendix:	
A. Statute	1a
B. Opinion of the Court Below	5a

AUTHORITIES CITED

Aiello Dairy Farms, 110 NLRB No. 205	19
American Newspaper Publishing Assn. v. NLRB, 190 F. 2d 45 (C. A. 7)	27
Armour & Co. v. Alton P. Co., 312 U. S. 195	25
B. F. Goodrich Co., 106 NLRB 757	10, 23
Brooks v. NLRB, 348 U. S. 96	14
Davis Furniture Co. v. NLRB, 197 F. 2d 435 (C. A. 9)	25
Denton Sleeping Garment Mills, Inc., 93 NLRB 329	18
Federal Trade Commission v. A. P. W. Paper Co., Inc., 328 U. S. 193	28
Frank Bros. Co. v. NLRB, 321 U. S. 702	28
Gilbert Co., 110 NLRB 231	18, 20
International Association of Machinists, Tool and Die Makers Lodge No. 35 v. NLRB, 311 U. S. 72	27, 28
International Brotherhood, etc. v. International Union, etc., 106 F. 2d 871 (C. A. 9)	25
Jacob Siegel Co. v. Federal Trade Commission, 327 U. S. 608	28

PAGE

Joy Silk Mills v. NLRB, 185 F. 2d 732, cert. denied 341 U. S. 914 12
Leiter Manufacturing Co., 112 NLRB No. 114, 36 LRRM 1123 ..... 10, 22
M. H. Davidson Company, 94 NLRB 142 19
Medo Photo Supply Corp. v. NLRB, 321 U. S. 678 16
Morand Bros. Beverage Co. v. NLRB, 190 F. 2d 576 (C. A. 7) 25
Mount Hope Finishing Co. v. NLRB, 211 F. 2d 365 (C. A. 4) 11, 15, 17
NLRB v. Don Juan, Inc., 178 F. 2d 625 25
NLRB v. Epstein, 203 F. 2d 482 (C. A. 3) 12
NLRB v. Gottlieb, 208 F. 2d 682 9
NLRB v. Howell Chevrolet Co., 204 F. 2d 79 (C. A. 9) 13
NLRB v. Inter-City Advertising Co., 190 F. 2d 420 (C. A. 4) 13
NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 ..... 16, 17
NLRB v. Ken Rose Motors, 193 F. 2d 769 (C. A. 1) 13
NLRB v. Kobritz, 193 F. 2d 8 (C. A. 1) 13
NLRB v. Southeastern Rubber Mfg. Co., 213 F. 2d 11 (C. A. 5) 13
NLRB v. Stewart, 207 F. 2d 8 (C. A. 5) 13
NLRB v. Stow Manufacturing Co., 217 F. 2d 900 (C. A. 2) 13, 29
NLRB v. Stowe Spinning Co., 336 U. S. 226 25
NLRB v. Union Pacific Stages, 99 F. 2d 153 (C. A. 9) 15
NLRB v. W. T. Grant Co., 199 F. 2d 711 (C. A. 9) 13
National Licorice Co. v. NLRB, 309 U. S. 350 26
North Electric Mfg. Co. v. NLRB, 123 F. 2d 887 (C. A. 6) 15
Phelps Dodge Corp. v. NLRB, 313 U. S. 177 28
The Hartford Currant Co., 64 NLRB 213 23
Texarkana Bus Co. v. NLRB, 119 F. 2d 480 (C. A. 8) 15, 17
Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 25

PAGE

Virginia Electric Co. v. NLRB, 319 U. S. 533 28
Virginia Railway Co. v. Federation, 300 U. S. 515 16
Walmac Co., 106 NLRB 1355 ..... 10, 23

MISCELLANEOUS

Fourteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1949 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

ARMCO DRAINAGE & METAL PRODUCTS, INC., FABRICATING DIVISION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Armco Drainage & Metal Products, Inc., Fabricating Division, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered on February 18, 1955, enforcing in part an order of the National Labor Relations Board dated August 13, 1953.

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (hereinafter called the "Board") are reported at 106 NLRB 725. The opinion of the Court of Appeals is reported at 220 F.2d 573, and a copy thereof is appended hereto.

JURISDICTION

The decree of the Court of Appeals was entered on February 18, 1955. An order of the Court denying Petitioner's petition for rehearing was entered on April 20, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1), and Section 10(e) of the National Labor Relations Act, as amended (hereinafter called the "Act").

QUESTIONS PRESENTED

I.

The Union wrote to Petitioner on January 29, 1952, claiming to represent a majority of employees in a designated unit and seeking recognition as bargaining agent for those employees. The letter clearly stated that if Petitioner did not reply the Union would file a petition for certification with the National Labor Relations Board. A petition was filed on February 5, 1952. On February 26, 1952, a consent election agreement was signed by the parties. In late February a Union activate told the plant manager that 115 employees had paid union dues. On March 11, 1952, the Union again wrote to Petitioner asserting its majority claim and offering to show signed authorization cards. At that date its majority claim was patently false. Petitioner declined recognition asserting it preferred to await the results of the election scheduled for one week hence. On March 18, 1952, the employees rejected the Union as bargaining representative by secret ballot. At no time did Petitioner do anything to intimidate or coerce, or in any way interfere with its employees in the exercise of their right to select or reject a bargaining agent in a secret election. The question in these circumstances is whether the Court of Appeals erred in directing Petitioner to bargain with a minority union, when the Union's loss of majority cannot be attributed to employer

unfair labor practices, but rather to an uncoerced rejection of the Union by the employees in a secret Board-conducted election?

II.

Whether knowledge of a card majority, when confronted with a bargaining demand, precludes an employer from insisting on a Board election if he agrees to a consent election and takes no unlawful action designed to dissipate the Union's card majority?

III.

Whether the Court of Appeals erred in not remanding the case to the Board for its determination as to whether Petitioner's failure to immediately grant recognition to the claiming Union is, of itself, a violation of Section 8(a)(5) of the Act, since the Board has exclusive jurisdiction to determine whether unfair labor practices have been committed and whether a remedy is required to effectuate the policy of the Act, and, if required, the nature and extent of the remedy?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. Sec. 141 *et seq.*) are set forth in the appendix to this petition, *infra*, pp. 1a-4a.

STATEMENT OF THE CASE*

The material facts in this case as found by the Court below are as follows. On January 29, 1952, the Union wrote

---

* The rules of the Court below permit the use of an appendix record on appeal. R. A. citations refer to original transcript pages in Respondent's appendix filed below. B. A. citations refer to actual page numbers of Board's appendix filed below.

to Petitioner claiming to represent a majority of employees in a designated unit, seeking recognition as the exclusive bargaining agent for those employees and requesting negotiations with Petitioner with respect to the terms and conditions of employment for the employees. The letter was neither preceded nor followed by telephone or other personal contact (R. A. 12-14b). It contained no offer to substantiate its majority claim either directly or through a neutral third party by means of a card check or otherwise (R. A. 13-14b). The letter did state clearly that the Union intended to file a petition for certification with the Board in the event Petitioner did not reply or grant recognition (G. C. Exh. 2, B. A. 416-17a).

During the brief interval between the receipt of the letter and February 5, Petitioner did not reply. On February 5, 1952, the Union did what it said it would do by filing a petition for certification (G. C. Exh. 1-A, B. A. 392a). Thereafter, counsel for Petitioner, the Board's Field Examiner, and, on February 26, 1952, the Union representative, handled the matter through to the consent election agreement executed on that date (G. C. Exh. 1-B, B. A. 394a).

Sometime in late February the new plant manager had a conversation with a Union activate and was advised that 115 employees had paid initiation fees (B. A. 271-272a). On March 11, 1952, the Union wrote to Petitioner protesting a letter that the plant manager had sent to the employees. This letter contained another majority claim and a request for a negotiation meeting which, in view of the election meeting scheduled the following week, the Union author did not expect (R. A. 13-14b). The majority claim was patently false at that date (B. A. 364-365a). Petitioner, by letter dated March 13, 1952 (G. C. Exh. 7, 425-426a) declined recognition pending the outcome of the election, and the Board did not find a law violation stemming from this letter.

From the time just shortly after the Union's January 29 letter was received, and particularly after the consent election agreement was signed, until its defeat in the March 18 election, the Union enjoyed and exercised complete campaign freedom. It had the entire plant as a forum for its electioneering, and it was so used at a not inconsiderable sacrifice of production and without Petitioner objection (R. A. 117b, 135b). It had the spacious property outside the plant even extending to the entrance to the property where literature was freely distributed (R. A. 13b, 58-59b). Plant manager Hutton told the foremen in group not to interfere with the campaign, and Petitioner's attorney had previously told the foremen essentially the same thing (B. A. 303a, 306-307a). Employees freely approached the foremen and even Hutton, the plant manager, discussing any and all subjects of interest to them, including the election and the merits and demerits of unionism generally. They were free to talk to each other and did so constantly (R. A. 117b, 123-124b, 135b). Union leaders made it clear that this activity was without fear of reprisal (R. A. 136b, 123-24b). Union handbills were brought into the plant (R. A. 44b, 59b, 132-33b). Union buttons (R. A. 45b, 59b) and ribbons (R. A. 45b) were worn openly during working hours. There was a good deal of discussion in the plant (R. A. 59b). Groups formed and argued (R. A. 50b), without restraint or interference by Petitioner (R. A. 60b). Production was seriously affected and at times came to a virtual standstill. A Union witness testified that "seventy-five per cent [of the employees] talked and twenty-five per cent worked" (R. A. 117b). Another Union witness did not think that much work was done (R. A. 135b).

This complete campaign freedom prompted the Court below to state (see Opinion *infra*, p. 20a):

> "In no labor case that has come before us does there seem to have been as much unrestrained talk on the

part of everyone, as well as absence of any fear of the consequences of expressing their opinion, on the part of the employees. . . . The plant seems to have been used by everyone—employees, supervisors and officials alike—as an election hall; and it is a most notable fact that in spite of all this discussion and argument, no employee ever felt that he was being discriminated against or that he would suffer any disadvantage or discrimination because of his views as to the union or his expression or argument as to those views; and no one ever did."

Following this period of complete campaign freedom the Union lost the March 18, 1952 consent election by a vote of 75 to 63 (G. C. Exh. 1-C, B. A. 397a). It thereupon initiated its search for a means of accomplishing that which it could not accomplish through the statutory secret ballot. On March 19, 1952, the Union wired the Board's Regional Director objecting to the election on grounds said to be contained in mailed charges (G. C. Exh. 1-D, B. A. 398a). A letter mailed to the Regional Director on March 21, 1952, pursuant to the telegram referred to two isolated events allegedly occurring on March 18, 1952, the date of the election (R. C. Exh. 2, R. A. 194b). The first charges filed on March 20, 1952, aside from applying the general terms of the statute and broadening the period of alleged violation from March 18 back to March 1, 1952, referred specifically only to the same two isolated events supposedly occurring on March 18 (G. C. Exh. 1-H, B. A. 399a). Neither of these two isolated events were ever substantiated as law violations.

The complaint issued by the General Counsel not only stated the charges but moved in retrospect through the months preceding the charged March period. It not only alleged a refusal to bargain in connection with the Union's March 11, 1952 letter, but it alleged a precharge refusal in connection with the Union letter dated January 2[illegible]

1952. The Trial Examiner (hence the Board) did not find a refusal to bargain in connection with the March 11 letter but did find a refusal in connection with the January 29 letter. The theory of the Board's Section 8(a)(5) refusal was stated by the Trial Examiner, in language adopted by the Board, at B. A. 328a as follows:

> "The violation of Section 8(a)(5) alleged in the complaint stems, according to the basic theory of [the] complaint, from the Company's failure to meet and negotiate with the Union as requested in the Union's letter of January 29, 1952. The Company in defense asserts that it had a good faith doubt of the Union's majority, and that it was entitled as a matter of law to have the Union's majority status tested in a secret ballot representation election rather than by what it characterizes as a form of 'Gallup' poll. With that the General Counsel takes issue. He points to *other* conduct, to be described below, in which the Company, directly and through its alleged agents, the Citizens Committee, engaged in the period between the bargaining demand and the election date, and which he claims was violative of Section 8(a)(1) and 8(a)(2). *That conduct,* he contends, refutes the Company's good faith assertion, impairs the March 13 [18] 1952 election results as a true reflection of the employees' uncoerced desires, and destroys whatever right to [the] Company might otherwise have had to insist as a predicate to a bargaining order that the Union first establish its majority status at a secret ballot election. *Resolution of the Section 8(a)(5) issue must thus await consideration of the other conduct alleged to have been violative of Section 8(a)(1) and (2), and it is to this that we now turn.* (Our emphasis.)

The Trial Examiner and the Board then proceeded to find that Petitioner had subsequent to its failure to recognize the union, coerced and intimidated its employees through threats, promises and interrogations so as to pre-

vent the expression of their true desires in the secret election. The Board then found, on the basis of this *other* conduct violative of Section 8(a)(1) and (2) of the Act, that Petitioner's failure to grant recognition to the Union was not based on good faith doubt but rather on a desire to gain time in which to dissipate the Union's card majority and was, on that basis, violative of Section 8(a)(5). The election was declared a nullity and the Union was granted the presumption of continued majority status, the election to the contrary notwithstanding.

On review the Court below reversed the Board's findings and conclusions with respect to intimidation and coercion as not supported by substantial evidence, or by any evidence at all. Thus the Court stated (see Opinion, *infra*, p. 20a):

> "Throughout the examination of the entire record we have been assiduous to discover promises, threats, intimidation, or coercion; and these, we have not found."

Again at *infra* p. 22a the Court stated:

> "If there were any evidence that the statements made by respondent's officials or supervisory employees expressly or implicitly coerced, intimidated, interfered with, threatened, or promised benefits to the employees, we would be bound to hold that such statements constituted unfair labor practices; *but there is no evidence to support such conclusions.*" (Our emphasis.)

Thus the Court below destroyed the entire basis of the Board's theory of a bad faith refusal. It denied enforcement of all of the Board's petition except that it enforced the Board's order directing Petitioner to bargain upon request with the Union.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

In so far as the decision below holds that an employer who gains knowledge that a claiming union has a card majority must immediately recognize and bargain with the union without more it is squarely in conflict with the decision of the Seventh Circuit Court of Appeals in *National Labor Relations Board* v. *Gottlieb,* 208 F. 2d 682 (1954).

In the *Gottlieb* case the union wrote the company claiming a card majority and requesting bargaining for the 6 employees in the tool room unit involved. Upon receipt of the union letter the employer immediately questioned each of the employees as to their union membership. He was advised that 5 of the 6 employees had signed authorization cards. Thus he had definite knowledge of a card majority. Shortly thereafter all the employees withdrew from the union. The Board found that the employees' withdrawal had been coerced by the employer's interrogation as to union membership and an alleged threat to close down the tool room. The Seventh Circuit held, on review, that the evidence was not sufficient to sustain the Board's finding that the employer had coerced his employees into withdrawing from the union. The Court also held, by implication, that since the union's loss of majority was not attributable to unfair labor practices on the part of the employer his refusal to bargain was not unlawful even though he knew the union had a card majority immediately after he received the request to bargain. In this connection the Court stated, *supra,* at p. 685:

> "Considering the record as a whole, it fails to reveal substantial evidence to show that the company committed unfair labor practices in violation of Sec. 8(a)(1). The Board's finding that the company refused to bargain in violation of Sec. 8(a)(5) was based in turn on its finding that the company had violated Sec. 8(a)(1). They fall together. As there is no basis in the record for the order of the Board, the enforcement of said order is denied."

The decision of the Seventh Circuit is compellingly significant in three important respects and is in direct conflict with the decision below on all three counts. First, the Seventh Circuit recognized and properly applied the Board's rule that mere knowledge of a card majority does not render unlawful *per se* an employer's refusal to immediately recognize and bargain with a claiming union.[1] Second, the Seventh Circuit recognized that the Board's refusal to bargain finding was predicated on its Section 8(a)(1) findings of coercion, and that without the 8(a)(1) element there was no 8(a)(5) violation. Third, the Seventh Circuit recognized that it did not have the power to dismiss the 8(a)(1) from that case and make an independent finding that the failure of the employer to immediately recognize the union standing alone was an unlawful refusal to bargain.

In so far as we have been able to determine the *Gottlieb* decision and the decision below are unique. They are the only two "refusal to bargain" cases in which the reviewing Courts of Appeals found that the Board's findings of unfair labor practices violative of Section 8(a)(1)(2)(3) or (4) of the Act were not substantiated by the evidence on the record considered as a whole. In both cases it was the Board's position that the employers' failure to reply to the unions'

---

[1] *Leiter Manufacturing Co.*, 112 NLRB No. 114; *B. F. Goodrich Co.*, 106 NLRB 757; *Walmac Co.*, 106 NLRB 1355. (Discussed in detail, *poste.*)

bargaining requests was based, not on any bona fide doubt of the unions' majority claims, but rather on a rejection of the collective bargaining principle and a desire to gain time in which to dissipate the union's majority. Evidence of the employers' bad faith lay in their unfair practices violative of other sections of the Act. In both cases the reviewing Courts of Appeals found that the employer had not committed unfair labor practices violative of other sections of the Act. Here all similarity ends, with one Court holding that the mere failure to reply was an unlawful refusal to bargain, the other holding that it was not.

The decision in *Gottlieb* is entirely consistent with another Circuit Court decision almost directly in point. In *Mount Hope Finishing Co.* v. *NLRB*, 211 F. 2d 365 (C. A. 4), the Board had found the employer guilty of unlawfully refusing to bargain with a union that won a Board-directed election. In that case the employer refused to recognize the union, had insisted that the union be certified pursuant to a Board-directed election and shortly after the union won the election the employer closed down its Massachusetts plant, and moved its operations to North Carolina. On the basis of these facts the Board concluded that the employer had unlawfully refused to bargain in good faith from the date the union made its original demand. The Fourth Circuit on review found that the move to North Carolina was motivated by sound economic principles as was the layoff of some 65 employees before the election which the Board had found discriminatory. The Court then held that since the employed could lawfully insist on an election, and since the evidence did not sustain the finding of unfair labor practices that formed the basis of the Board's conclusion, that the employer's refusal to bargain was unlawful, the 8(a)(5) portion of the Board's order was without basis and was dismissed along with the rest of the order.

Actually, the decisions of the Seventh Circuit in *Gottlieb* and the Fourth Circuit in *Mount Hope Finishing Co.*, are consistent with every other Circuit Court of Appeals decision on this point where the reviewing court has *upheld* the Board's findings of unfair labor practices violative of other sections of the Act. The most frequently cited case on this point is *Joy Silk Mills* v. *NLRB,* 185 F. 2d 732, cert. denied 341 U. S. 914, wherein the Circuit Court of Appeals for the District of Columbia held, *supra,* at p. 741:

> "The question presented is then whether Gilbert's refusal to bargain *was permissible* under the Act. It has been held that an employer may refuse recognition to a union when motivated by a good faith doubt as to that union's majority status. *North Electric Mfg. Co.* v. *NLRB,* 6 Cir., 123 F. 2d 887; *NLRB* v. *Chicago Apparatus Co.,* 7 Cir., 116 F. 2d 753. When, however, such refusal is due to a desire to gain time *and to take action* to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in section 8(a)(5) of the Act." (Emphasis ours.)

The Court then went on to hold that the Board's findings that the employer had interfered with the election were supported by the evidence and that the employer's coercive activities preceding the election were sufficient "... to permit the Board to conclude that its refusal to bargain was as ill-intentioned as its *other* actions." (Emphasis ours.)

In *NLRB* v. *Epstein,* 203 F. 2d 482, 484 (C. A. 3), a similar type case, the Court held:

> "Of course, an employer may rightfully withhold recognition from a union *possessed of majority status* and request an election to confirm its accreditation if there is a bona fide doubt of a majority. Where the refusal is merely to afford time *to take action* to dissipate the majority, it constitutes a violation of the duty

> to bargain set forth in Section 8(a)(5) of the Act." (Emphasis ours.)

In *NLRB* v. *Stewart*, 207 F. 2d 8 (C. A. 5), the Court stated:

> "It is well recognized that an employer may withhold recognition from a Union *representing a majority* of his employees only if the employer in good faith doubts the Union's claim." (Emphasis ours.)

In both the latter cases there was no question but what the unions involved represented a majority of employees. However, the employers' failure to recognize was not unlawful for that reason alone, but rather for the reason that the failure to recognize was designed to gain time in which to take other unlawful action to dissipate the union majority in each case. The unlawful acts of interference and coercion were clear evidence of the employers' lack of good faith in refusing to bargain. Absent the acts of interference and coercion the failure to recognize would not have been unlawful.

To the same effect are the following Circuit Court decisions: *NLRB* v. *Inter-City Advertising Co.*, 190 F. 2d 420 (C. A. 4); *NLRB* v. *Kobritz*, 193 F. 2d 8 (C. A. 1); *NLRB* v. *Ken Rose Motors*, 193 F. 2d 769 (C. A. 1); *NLRB* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (C. A. 9) *NLRB* v. *W. T. Grant Co.*, 199 F. 2d 711 (C. A. 9); *NLRB* v. *Southeastern Rubber Mfg. Co.*, 213 F. 2d 11 (C. A. 5); *NLRB* v. *Stow Manufacturing Co.*, 217 F. 2d 900 (C. A. 2).

The foregoing cases make it clear that the rule governing this type of case is that an employer may refuse to bargain with a claiming union until it establishes its status in a Board-conducted election so long as he takes no independent unlawful action aimed at destroying the union's majority, and this is true whether or not the employer has knowledge

of a card majority. In stating that rule we want to make it clear that we are not contending that an employer has an absolute right to refuse to bargain until the union becomes certified. We recognize, as this Court recently stated in *Brooks* v. *NLRB,* 348 U. S. 96, that while Board certification can only be granted as a result of an election "... an employer would presumably still be under a duty to bargain with an uncertified union that had a clear majority. . . ." We also recognize that the duty to bargain may arise as of the time that a union with a clear majority makes its bargaining demand. However, we do contend that that theoretical duty to bargain is by Board practice held in abeyance during a representation proceeding and is only revived, or presumed to have been a continuing obligation, where the employer has committed unfair labor practices designed to defeat the purposes of the representation procedure and evidencing an unlawful rejection of the collective bargaining principle.

We can perhaps best illustrate the practical application of this principle by applying it to two distinct hypothetical fact situations. Assume in one case a bargaining demand by a union possessed of a majority which is refused by the employer who insists on an election. The parties agree to a consent election which the union loses. The essential ingredients are a demand, a refusal and a lost election. In the second case assume a demand, a refusal and a lost election, but add a series of employer unfair labor practices that contribute directly to the union's loss of majority. In the second case the essential ingredients are a demand, a refusal, employer unfair labor practices, and a lost election. In both cases there "presumably" was an obligation to bargain at the time the demand was made, but in the first case the Board would excuse an employer from his obligation, while in the second case it would not permit him to avoid his obligation where his obvious purpose was to

dissipate the union's majority or prevent a free choice in the subsequent election. The case at bar and the *Gottlieb* and *Mount Hope Finishing Co.* cases fall within the first type case, while *Joy Silk Mills* and *Kobritz* and kindred cases cited previously, fall within the second type of case.

Thus, when we say that the cases make it clear that an employer may refuse to bargain until the claiming union establishes its majority in a Board election, we are saying that the cases confirm the Board's exercise of its prerogative to excuse an employer's refusal to bargain on equity principles when the employer in refusing to bargain does nothing to dissipate the majority or prevent a free election. It is the exercise of this prerogative by refusing to revive a statutory obligation to bargain arising at the time of the demand after the union has lost an election, with which the employer has not interfered, that becomes the right of an employer to refuse to bargain when he is acting in good faith.

In failing to follow that rule the Court below brought itself in conflict with every Circuit Court decision on this point, in addition to bringing itself in conflict with the Seventh Circuit on the knowledge issue.

In so far as the decision below holds that an employer, when confronted with a surprise bargaining request, must immediately recognize and bargain with the claiming union without being entitled to wait until the union offers to demonstrate its claimed majority, it is in conflict with the following Circuit Court cases:

Mount Hope Finishing Co. v. *NLRB,* 211 F. 2d 365 (4th Cir. 1954); *Texarkana Bus Co.* v. *National Labor Relations Board,* 119 F. 2d 480 (8th Cir. 1941); *National Labor Relations Board* v. *Union Pacific Stages,* 99 F. 2d 153 (9th Cir. 1938).

The decision below is also in direct conflict on this point with *North Electric Mfg. Co.* v. *National Labor Relations*

Board, 123 F. 2d 887 (6th Cir. 1941), although the latter case does not appear to be expressly overruled by the decision below. This Court took cognizance of all but one of the cited cases, and the principle they establish in Mr. Justice Rutledge's dissenting opinion in *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U. S. 678, 692 (1944).

The evidence in this case establishes beyond peradventure of a doubt that the Union's letter of January 29, 1952 came as a complete surprise to Petitioner. It was neither preceded or followed by personal contact either by union representatives or employees designated to speak for the Union. Employees who signed cards testified, without exception, that they had signed secretively and without Petitioner knowledge. After mailing its initial letter the Union made no effort to demonstrate or in any way substantiate its majority claim. It waited five working days after Petitioner had received the letter and then filed its petition for certification as it said it would. The Court below held that none of these considerations justified a failure to reply to the Union's letter or a failure to recognize and bargain with the Union, or "at least to inquire as to the proof of its designation as bargaining agent for the majority of employees." Thus, the Court below places squarely on the employer the burden of determining the accuracy of every Union claim of majority, and this in spite of the fact that the Act and Board decisions place severe restrictions on the right of employers to investigate union activity among their employees.

This Court, in *Virginia Railway Co.* v. *Federation,* 300 U. S. 515 (1937) held that the law "imposes the affirmative duty to treat only with the true representative and hence the negative duty to treat with no other." That holding, arising under the Railway Labor Act, was noticed and applied to the Act under consideration in *NLRB* v. *Jones*

& Laughlin Steel Corp., 301 U. S. 1, 44. Realizing that this language placed an employer at his peril in recognizing a bargaining representative, the Eighth Circuit Court of Appeals in *Texarkana Bus Co.* v. *NLRB, supra,* held that:

> ". . . common prudence dictates that he [employer] refrain from acting until satisfactory proof is produced that the representative in fact speaks for a majority of employees. . . . The employer cannot be required to devote his time to negotiating with every individual claiming to represent a bargaining unit, and cannot be charged with unfair practice in this regard unless there is presented to him evidence of a substantial character showing that the representative is in fact an authorized bargaining agency."

In *Mount Hope Finishing Co.* v. *NLRB, supra,* the Board had found an 8(a)(5) violation in the respondent's failure to immediately recognize and bargain with the union upon request. Instead respondent insisted that the union first become certified. In reversing that finding the Fifth Circuit said that the Board had not taken into account the union's failure to offer to show the company by membership cards or otherwise, that it represented a majority and that the union filed its petition for certification before it received the employer's refusal to bargain. The Court then went on to say, *supra,* at p. 373:

> "The case therefore falls within the rule that when an employer is faced with a demand for recognition of a union, he may withhold recognition until the union's claims are established."

In the case at bar the Union did not offer to demonstrate its card majority until its March 11 letter. By that date its majority claim was without foundation and the election was scheduled for one week hence.

THE DECISION OF THE COURT BELOW RAISES A QUESTION OF MAJOR IMPORTANCE IN THE ADMINISTRATION OF THE ACT.

In a recent decision, *Gilbert Co.*, 110 NLRB 231, the Board made the following statement:

> "The question of whether and in what circumstances the Board should, consonant with the statutory policy, issue a bargaining order in favor of a union on a showing of authorization cards, *is a recurring one of considerable importance in the administration of the statute.*" (Emphasis ours.)

Actually, this serious question is twofold in nature for it involves cases where the union has followed the Board's representation procedure through a secret election and lost, as well as cases like *Gilbert* where the petition was withdrawn and an 8(a)(5) charge filed before an election.

The problem with which we are directly concerned, one which this Court has never directly considered, arises when a union follows the representation procedure through a secret election and loses, and then seeks to establish its bargaining status on the basis of signed cards obtained weeks and sometimes months before the lost election. This problem has plagued the Board for years and its natural repugnance toward issuing a bargaining order in derrogation of its own secret election result has caused it to devise a series of rules over the years to govern the "lost-election" situation. The original post-1947 rule set forth in *Denton Sleeping Garment Mills, Inc.*, 93 NLRB 329 (1951), was to the effect that a union could not use, as a basis for setting aside an election, any unfair labor practices committed by an employer, with union knowledge, before the election. The union had to choose between proceeding with an election or withdrawing its petition and filing charges. If it chose the former it was deemed to have waived the unfair labor practices.

Shortly thereafter in *M. H. Davidson Company,* 94 NLRB 142 (1951), the majority of the Board (Member Murdock dissenting) modified that rule so as to permit a union to file an 8(a)(5) charge after losing an election. In that case it was the theory of the majority that if the employer's failure to recognize the union and insistence on an election was predicated solely on a desire to gain time in which to take unlawful action to dissipate the union's majority it was unlawful. It this manner unions were permitted "two bites of the apple"—they could follow the election procedure through to defeat and then seek bargaining status through Board direction.

Finally, in *Aiello Dairy Farms,* 110 NLRB No. 205 (1954), the Board (Member Peterson dissenting) reversed the *M. H. Davidson* case and established the current rule that a union that follows its certification procedure through an election with knowledge of employer unfair labor practices will not be permitted to ". . . revert to an 8(a)(5) proceeding based upon the same unfair labor practices as a means of establishing its representative status." Thus the wheel has turned full circle and the Board is back to the point where refusal to bargain cases fall within an absolute waiver rule.

We have detailed the Board's "waiver" rules in lost-election situations to demonstrate as forcefully as possible the reluctance of the Board to ignore the results of its own election procedure. To ignore a secret election result is not only dangerous, but is administratively unwise as the majority pointed out in the *Aiello* decision. However, the Board, in the *Davidson* case, did make a narrow exception to its "waiver" rule in cases where the employer used the time gained by his refusal to recognize to take serious and unlawful action to destroy the union's majority. That this was intended to be the only exception is clear, and yet the Court below, by holding that a mere failure to recognize

with knowledge of a card majority, but without unlawful action on the part of the employer, is of itself an unlawful refusal to bargain has introduced a new rule that is certain to add a new and distressing element of confusion in the administration of the Act, as it relates to the issuance of bargaining directives on the showing of authorization cards.

The soundness of the new rule from an administrative viewpoint becomes a question of critical importance as a result of the recently announced *Aiello* rule whereby a union must either go through with the election and be bound by the result or must withdraw its petition and file an 8(a)(5) charge. Recent Board decisions, to be discussed below, indicate that unions are withdrawing and filing charges. When this is done the Board is still confronted with the question of whether the employer's refusal to bargain is unlawful. In deciding this question the Board is still judging the legality or illegality of the refusal in the light of the employer's *other conduct*. This policy is clearly in conflict with the decision below, and, if that decision is permitted to stand employers will never know in any given situation whether their conduct is legal or illegal, or, whether it will be considered legal by the administrative agency charged with the responsibility of administering the Act and later held to be illegal by a reviewing court.

The conflict between the decision below and Board policy is pointed up sharply in *Gilbert Co.*, 110 NLRB No. 231. In that case the employer learned that 15 of his 27 employees had signed authorization cards before the union made its request for bargaining. The same day the employer interrogated his employees as to their union activity and announced a forthcoming wage increase. The next day a poll was conducted among the employees to determine whether they wanted union representation. At a meeting with union representatives a day or two later, the employer

refused recognition insisting that the union first prove its majority in a secret election. In the light of the employer's unfair practices the union refused to agree to an election and filed charges alleging among other things an unlawful refusal to bargain.

The Board found that the employer had violated Section 8(a)(1) by interrogating and polling the employees. It then passed to the consideration of the refusal to bargain charge with this preliminary statement:

> "Ordinarily when confronted with a union's claim that it represents a majority of employees in an appropriate unit together with a request for collective bargaining, *the employer may refuse to rely upon evidence of representation in the form of authorization cards signed by employees and insist that the union prove its majority in a secret election conducted under Board auspices.* However, the Board, with the approval of the courts, has made *an exception to this right* of an employer, where the refusal to recognize the union is motivated not by a good faith doubt of the union's majority, but, as stated in the *Joy Silk Mills* case, which is hereby reaffirmed, 'is due to a desire to gain time *and to take action* to dissipate the union's majority. . . .'" (Emphasis ours.)

The Board then went on to point out that the question of whether an employer is legitimately or illegitimately motivated in refusing recognition:

> ". . . depends in the final analysis, upon all the facts and circumstances of that case. There is no rule which will save the Board from the necessity of a discriminating analysis and appraisal of all the relevant evidence before making a good or bad faith determination. It is all the circumstances of the particular case, including the employer's background, the 'character or extent' of the unfair labor practices, and the sequence of events which must be considered before a good or bad faith determination can be made."

The Board then found that the employer's expressed willingness to have an election was an indicia of good faith as was the absence of unfair labor practices *after* the request for an election, and that the employer violations of Section 8(a)(1) were not sufficient to establish bad faith. The refusal to bargain therefore was not unlawful. Compare those facts with the instant case where Petitioner immediately agreed to a consent election and committed *no unfair labor practices* at any time. Clearly, under the Board's own rules, Petitioner's failure to recognize the Union was not unlawful. Of equal significance is the fact that the Board went into the good faith question at all, for, if the decision of the Court below were correct, and not in direct conflict with Board policy, all that would have been necessary would have been for the Board to determine, as it noted incidentally, that the employer knew that 15 of his 27 employees had joined the union. With such knowledge the failure to recognize would have been illegal *ipso facto*. That the Board consciously rejected such a proposition bespeaks clearly its administrative determination that such a rule is not consonant with statutory policy.

Another case to the same effect is *Leiter Mfg. Co.*, 112 NLRB No. 114, 36 LRRM 1123. There the union represented a majority, evidenced by signed authorization cards, at the time it requested bargaining. The employer refused to recognize the union on three separate occasions. Each time the refusal was based on his insistence that the union obtain Board certification. The Board held that the refusal to bargain was not unlawful pointing out first that an employer may withhold recognition from a union "having majority status" if he does so in good faith. The Board then stated:

> "Therefore, the fact that the employer had good reason to believe that a majority of the employees had

signed union cards did not preclude him from *lawfully* demanding an election as a prerequisite to recognition, so long as he did not do so for the purpose of delay *to gain time to dissipate this majority.*" (Emphasis ours.)

At the risk of belaboring this point unduly we also want to make it clear that the Board's policy rule that a failure to recognize is not unlawful in the absence of other conduct was in effect at the time of the decision below and for a considerable period of time prior thereto. A case directly in point and decided prior to the decision below is *B. F. Goodrich Co.*, 106 NLRB 757. The union had a card majority at the time it made its bargaining request. The signed cards were shown to a company official who copied down the names and compared them with the store payroll. In the face of this knowledge the employer refused recognition without an election. The union filed charges alleging that the employer had violated Section 8(a)(1) and (5) of the Act. The Board, after finding that the employer had not violated Section 8(a)(1) dismissed the complaint in its entirety, although it specifically found that the union represented "a majority of the employees in the appropriate unit at all times material herein," and that the employer specifically "refused to recognize the Union." See also *Walmac Co.*, 106 NLRB 1355, and *The Hartford Currant Company*, 64 NLRB 213, to the same effect.

In the Fourteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1949, the Board, in reviewing its decisions in this field stated, *supra*, p. 71:

> "Further, the Board has held that an employer acting *in good faith*, may with impunity challenge the union's majority claim and condition bargaining upon substantiation of the claim in a Board election, even though the demand for recognition is properly made." (Emphasis as in original.)

The rule has been restated in every subsequent Annual Report.

From the foregoing it is clear that the Board has always been troubled with devising a policy to govern the issuance of bargaining directives on the basis of signed authorization cards that will accord with statutory policy. To date the issuance of bargaining directives on the basis of cards has been administratively sanctioned in only one narrowly defined type of unfair labor practice case. The Board, charged with the initial responsibility for properly administering the Act, has never deviated from this single exception to its waiver rule; that is, that a failure to recognize is not unlawful unless the employer's other conduct demonstrates that the purpose of the employer is to gain time to take action to destroy the union's majority. The Court below has attempted to establish a new and arbitrary rule in the instant case. To sustain the new rule would be to add to the problems of the Board in its attempt to devise and apply in these cases, a sound policy consistent with statutory policy and the Congressional intent. It is also manifest that where two conflicting rules are intended to govern the same situation the result is bound to be confusion for employers who will be unable to determine a lawful course of action when confronted with a union claim of majority and a request for bargaining. If they petition for an election, as they have a statutory right to do, or if they insist that the union petition for an election, as they have a Board-sanctioned right to do, they may find that years later it will be decided that the mere insistence on an election is sufficient basis for an order directing them to bargain with a minority union. Such an order will be then, as it is now, contrary to statutory policy and repugnant to the basic concepts of industrial relations.

III.

THE COURT BELOW ERRED IN ENFORCING THE 8(a)(5) PORTION OF THE BOARD'S ORDER AFTER MAKING ITS OWN FINDINGS TO SUPPORT IT INSTEAD OF REMANDING IT TO THE BOARD FOR A DETERMINATION OF THE 8(a)(5) ISSUE IN THE LIGHT OF ITS OPINION.

The Board's theory of this case from the Trial Examiner's Intermediate Report through counsel's argument in the Court below, was that Petitioner's failure to answer the Union's letter of January 29, 1952 was an unlawful refusal to bargain *because* it was motivated not by a good faith doubt of the Union's majority status, but rather by a desire to gain time in which to take unlawful action to dissipate the claimed majority. Evidence of Petitioner's bad faith was found by the Board in the alleged unfair practices violative of Section 8(a)(1), 8(a)(2) and 8(a)(4) of the Act.

The Court below found, however, that there was not substantial evidence on the record, considered as a whole, to sustain the Board's unfair labor practice findings. In so doing the Court destroyed the entire basis of the Board's theory of a bad faith refusal. This required, if not a dismissal of the Board's petition in its entirety, at the very least, a remand to the Board for its determination as to whether Petitioner's refusal to bargain was unlawful in the absence of unfair labor practices. *Davis Furniture Co.* v. *NLRB*, 197 F. 2d 435 (C. A. 9), *Morand Bros. Beverage Co.* v. *NLRB*, 190 F. 2d 576 (C. A. 7); *NLRB* v. *Stowe Spinning Co.*, 336 U. S. 226; *NLRB* v. *Don Juan, Inc.*, 178 F. 2d 625; *International Brotherhood, etc.* v. *International Union, etc.*, 106 F. 2d 871 (C. A. 9); *Armour & Co.* v. *Alton P. Co.*, 312 U. S. 195; *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. Instead, the Court determined that Petitioner's failure to recognize the Union on January

30, 1952 was unlawful *ipso facto*. In so doing the Court exceeded its power of review and improperly invaded an area reserved exclusively for the Board by the Congress, for, as this Court said in *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 365:

> ". . . Sections 10(a) and (c) of the Act commits to the Board *the exclusive power* to decide *whether unfair labor practices have been committed* and to determine the action the employer must take to remove or avoid the consequences of his unfair labor practices." (Emphasis ours.)

Furthermore, after finding that Petitioner's mere failure to recognize was in of itself unlawful, a finding the Board did not and would not make, the Court below fashioned a remedy for the bargaining transgression it had judicially found. We say the Court below made an independent finding of an unfair labor practice and fashioned its own remedy therefor because we think it clear that it cannot seriously be contended that in directing Petitioner to bargain the Court was simply enforcing the Board's remedy. This is made strikingly clear by a comparison of the reasons given for the remedy directed by the Board and the Court, respectively. Thus, the Trial Examiner in his Intermediate Report (B. A. 379a, adopted by the Board) states that:

> ". . . it must be presumed, and it is here found, that since the Union enjoyed a majority on January 30, 1952, when the bargaining request was received by the Company, any subsequent defection from the Union was attributable to the Company's *intervening unfair labor practices.*" (Emphasis ours.)

On the other hand, the Court below held that, ". . . An order which would fail to guarantee to the union restoration to the status which it would have enjoyed, except for an

employer's conduct in wrongfully refusing to bargain, would allow such party to profit by its own wrong." Thus, it is clear that the Board is saying that an order which failed to restore the union to the status it enjoyed before the employer destroyed its majority through the commission of unfair labor practices would allow Petitioner to profit by its own wrongdoing. It was that wrong that the Board's order sought to remedy. The Court after finding that Petitioner committed no intervening unfair labor practices, and thus establishing that Petitioner did not unlawfully dissipate the Union's majority, is saying that an order that failed to restore the Union to the status it enjoyed before Petitioner failed to recognize it, would permit Petitioner to benefit from a single act that *the Court* found to be unlawful. The remedy is admittedly the same but it is invoked by the Court on a totally different basis and to remedy a totally different act which the Court alone found to be unlawful.

Assuming for purposes of argument that Petitioner's failure to recognize, standing alone, was an avoidance of a statutorily implied obligation to bargain, it was not incumbent on the Court below to make that finding or to fashion the remedy. For all practical purposes the decision below is to the effect that the Board erred as a matter of law in not finding the failure to recognize, by itself, an unlawful refusal to bargain. When a reviewing court finds that the Board erred as a matter of law, the only power the Court has is to remand the case to the Board. The Court lacks any power to fashion a remedy. *American Newspaper Publishing Assn.* v. *NLRB*, 190 F. 2d 45 (C. A. 7).

This Court has consistently recognized and enforced that principle. In *International Association of Machinists, Tool and Die Makers Lodge No. 35* v. *NLRB*, 311 U. S. 72, it was held that:

> "... It is for the Board not the courts to determine how the effect of prior unfair labor practices may be expunged. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271, 82 L. Ed. 831, 837, 58 S. Ct. 571, 115 ALR 307; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461, 84 L. Ed. 396, 400, 60 S. Ct. 307."

The rule is equally applicable to the review of orders of other administrative agencies under comparable statutes. In *Federal Trade Commission* v. *A. P. W. Paper Co., Inc.*, 328 U. S. 193, 203-4, this Court said:

> "... The fashioning of the remedy is a matter entrusted to the Commission which has wide latitude for judgment...."

In *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612, this Court said:

> "... The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed."

In that case this Court also stated, *supra*, at pgs. 611-612: "... Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited.", citing among other cases, *International Association M.T.D.M.L.* v. *NLRB*, 311 U. S. 72, *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177; *Virginia Electric Co.* v. *NLRB*, 319 U. S. 533; *Frank Bros. Co.* v. *NLRB*, 321 U. S. 702.

In the instant case the Board found that a series of unfair labor practices violative of Section 8(a)(1), 8(a)(2), and 8(a)(4) of the Act added up to a violation of Section 8(a)(5). The Court found that there were no 8(a)(1), 8(a)(2) or 8(a)(4) violations, but proceeded to find an 8(a)(5) violation. The Board finding was that the whole equalled the sum of the parts while the Court found the

whole without benefit of the parts. That is a geometric impossibility and a legal anomaly. In reaching its conclusion the Board relied on its "putative specialized experience in the field of labor relations: an experience that is thought to enable it to appraise causes and consequences that escape the perception of those less widely acquainted with those relations."[2] Congress assumed that courts lacked the same perception and therefore denied them the right to make original findings of unfair labor practices or to fashion remedies therefor. In the instant case the Court exceeded that Congressional mandate. Board expertise must be relied on in determining the cause and effect of employer's acts and since the Board's prerogative in this area is exclusive, the only proper course for the Court below was a remand to the Board with instructions to make specific findings and conclusions as to the legality or illegality of Petitioner's failure to recognize the Union in the light of the facts as found by the Court. Once that finding is made it will be for the Board to determine whether a remedy is necessary, and if so, the nature and extent of the remedy.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

FROST & JACOBS,
By CARL M. JACOBS,
GEORGE R. CASSIDY,
2301 Union Central Building,
Cincinnati 2, Ohio,
Attorneys for Petitioner, Armco Drainage & Metal Products, Inc., Fabricating Division.

---

[2] *NLRB* v. *Stow Manufacturing Co.*, 217 F. 2d 900 (C. A. 2).